Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, RAYMOND L. KASICKI, AND HARRY KIJOWSKI,

Petitioners,

v.

MICHAEL H. URBACH, TAX COMMISSIONER, NEW YORK DEPARTMENT OF TAXATION AND FINANCE,

Respondent.

Petition for a Writ of Certiorari to the New York Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state tax should be treated as a user fee for purposes of the Commerce Clause where it is imposed only on those who use certain state facilities or services and is measured by the extent of that use.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of New York, Appellate Division, First Department (App., *infra*, 1a-10a) is reported at 718 N.Y.S.2d 282, 279 A.D.2d 171. The opinion of the Supreme Court of New York, County of New York (App., *infra*, 11a-18a) is reported at 699 N.Y.S.2d 268, 182 Misc. 2d 576. The order of the New York Court of Appeals denying petitioners leave to appeal (App., *infra*, 19a-20a) is not reported.

JURISDICTION

The order of the New York Court of Appeals denying petitioners leave to appeal was entered on October 16, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the U.S. Constitution, U.S. Const. Art. I, § 8, cl. 3, provides: "The Congress shall have the Power * * * To regulate Commerce with foreign Nations, and among the several States, and the Indian Tribes."

The relevant provisions of New York Tax Law, Article 21-A, and Article 13-A, § 301-h, are set out in the appendix to this petition at 21a-24a.

STATEMENT

This case presents a question of considerable importance regarding the proper application of the Commerce Clause: how to determine whether a state levy on participants in interstate commerce is a user fee or a general revenue tax. That distinction has great practical significance. Under this Court's

precedents, a user fee will be upheld only if there is "a showing, based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered [to the taxpayer].'" *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 622 n.12 (1981) (citation omitted). General revenue taxes, in contrast, are subject to a much more forgiving standard. States may defend general revenue levies by showing little more than that the amount of tax imposed varies in proportion to the level of the taxpayer's in-state activities; taxing authorities need not demonstrate that the tax collected actually approximates the cost or value of the services provided to the taxpayer by the State. See, *e.g.*, *id.* at 622-623.

Here, the state court set out an insupportable and dangerous test to distinguish user fees from general revenue taxes. In holding that New York State's levy on the use of motor fuel is not a user fee, the court found dispositive the *label* attached to the tax by the state legislature, while wholly disregarding the *actual character* of the fee. That embrace of formalism and rejection of economic reality cannot be squared with this Court's precedents. Not surprisingly, the ruling also frustrates significant Commerce Clause policies, encourages manipulation and evasion of Commerce Clause requirements, and inevitably will cause great confusion in a much-litigated area. Review by this Court therefore is warranted.

1. The State of New York imposes a toll on motor carriers that travel on the Governor Thomas E. Dewey Thruway (the "New York Thruway" or "Thruway"). Thruway toll revenue collected from a typical five-axle truck amounts to approximately seven cents per mile traveled. See R. 24. These tolls, along with related revenue from concessionaires, pay for all services provided by New York to commercial vehicles operating on the Thruway. On the current state of the record, it must be accepted, as alleged in the complaint, that "[t]he entire cost of operating the New York Thruway, including all

administrative, maintenance and capital costs, as well as the cost of traffic control, safety, and all policing functions, are paid for through tolls, restaurant and service station concessions, and similar earnings." R. 23. See App., *infra,* 12a & n.2.

This case concerns the validity of a second New York levy, the Fuel Use Tax ("FUT"), which the State also imposes on commercial motor carriers traversing New York roads, including the Thruway. Article 21-A, § 523(a) of the New York Tax Law imposes "a tax on fuel use for the privilege of operating any qualified motor vehicle upon the highways of this state." The "qualified motor vehicles" subject to the levy are commercial vehicles that have three or more axles or exceed 26,000 pounds. *Id*, § 521(b)(1)(i), (ii). The FUT is collected on fuel consumed by these trucks while driving on the public highways of New York State, and thus effectively is incurred by using New York roads and measured by the extent of such use. Motor carriers that purchase fuel in New York are entitled to a credit or refund for the tax paid on such fuel at the pump when the fuel is consumed outside the State; conversely, carriers that purchase fuel outside New York but use it in the State are required to pay the FUT on the portion of that fuel used in New York. *Id.*, § 526(a), (b). Revenues collected under this provision of the statute are placed in New York's "dedicated highway and bridge trust fund." *Id*, §§ 515, 528(a). See App., *infra*, 3a. A related levy on the use of fuel is collected on identical terms pursuant to Article 13-A, § 301-h, of New York's Tax Law. This portion of the levy is placed in the State's general fund. *Id*, § 301-h(d). In total, the tax collected under these two provisions (collectively referred to here as the FUT) amounts to approximately 30 cents per gallon of fuel consumed, or five cents per mile, for a large commercial vehicle. R. 23.[1]

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[1] Under the scheme established by the Intermodal Surface Transportation Efficiency Act of 1991, 49 U.S.C. § 31705, motor

2. Petitioners here – the Owner-Operator Independent Drivers Association ("OOIDA"), a business association of persons and entities who own and operate motor carrier equipment,[2] and two individual owner-operators who respectively reside in Ohio and New York – brought this action in New York state court to challenge the constitutionality of the FUT as the levy applies to travel on the New York Thruway. Petitioners maintain that the FUT is a "user fee" within the meaning of the Commerce Clause and that, under a long line of this Court's precedent, such a fee is invalid unless record evidence supports the conclusion that the amount collected reasonably approximates the cost or value of the services provided by the taxing State to the fee payer. Petitioners have contended that the FUT cannot satisfy this test because, so far as travel on the Thruway is concerned, the *entire* cost of such services is realized by the State from tolls and related revenues. As a consequence, petitioners' position is that application of the FUT to Thruway miles – a use for which they have already fully paid – is manifestly excessive under the governing

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carriers report and pay all of their state fuel tax obligations quarterly to the State or Canadian Province in which they are registered (their "Base State"), rather than making multiple payments to the different States or Provinces in which they operate (the "Taxing States"). The Base State, to which the payer's total fuel-tax payment is made, then transfers the appropriate funds to the State in which the fuel-tax liability was incurred. As a Taxing State, New York receives and maintains fuel tax returns only for taxpayers for whom New York is the Base State. Taxpayers based in other States file their fuel tax returns, which reflect their New York fuel-tax liabilities, in their individual Base States. R. 20.

[2] Owner-operators comprise one of the primary sectors of the interstate motor carrier industry, accounting for an estimated forty percent of all intercity truck traffic in the United States. At the time this suit was filed, OOIDA had over 40,000 members residing in all fifty States and Canada. R. 18.

Commerce Clause test. Petitioners did not contest the constitutionality of the FUT as it applied to travel on other New York roads.

The state trial court rejected this argument, dismissing the case for failure to state a claim upon which relief could be granted. App., *infra*, 11a-18a. The court was of the view that taxpayers cannot make out a Commerce Clause claim unless there has been "differential treatment of intrastate and interstate commercial interests." *Id.* at 15a. Alternatively, the court held that the FUT should be upheld because, "[e]ven assuming plaintiffs' claim is true – *i.e.*, that the full cost of the Thruway is covered by the tolls imposed –" the State need show only that the measure of the tax is in some sense related to the extent of the taxpayers' in-state activities. *Id.* at 17a.

The Appellate Division of the New York Supreme Court affirmed, although on somewhat different grounds. App., *infra*, 1a-10a. After noting that the FUT did not in terms discriminate against interstate commerce (*id.* at 4a-6a), the court recognized that "any user fee that fails to fairly reflect the value of the service provided by the State that imposes it is, *ipso facto*, an undue burden on interstate commerce." *Id.* at 7a. The court found that rule inapplicable here, however, because it held that the FUT is *not* a user fee.

In the court's view, "[c]ases construing taxes imposed for the 'privilege' of conducting activities within the levying State normally involve general revenue assessments, not user fees"; because the FUT is labeled a tax on the "privilege" of using New York's roads, the court concluded that it "is not, by the plain import of its language, a user fee." App., *infra*, 7a. The court added that the FUT also should not be characterized as a user fee because the court was unconvinced that it was "'designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services'" (*id.* at 7a-8a (citation omitted))

– even though the court acknowledged that "the calculation of the fuel use tax [is] based upon milage amassed on the State's highways" and that a portion of the FUT revenue is placed in New York's highway and bridge trust fund. *Id.* at 8a. The court therefore judged the FUT according to the test applicable to general revenue taxes and upheld it under that standard. *Id.* at 8a-10a.

The New York Court of Appeals denied petitioners leave to appeal. App., *infra*, 19a-20a.

REASONS FOR GRANTING THE PETITION

The holding below, which greatly expands state power to impose burdensome taxes and fees on instrumentalities of interstate commerce, threatens to cause considerable mischief and confusion in an area of law that this Court has itself described as a "'quagmire.'" *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 280 (1987) (citation omitted). This Court has drawn a sharp distinction between the Commerce Clause treatment accorded general revenue taxes, on the one hand, and user fees, on the other. But the court below subverted that rule by holding that the New York Fuel Use Tax should *not* be treated as a user fee for Commerce Clause purposes – even though the FUT is imposed on a narrow category of payers who become liable for the fee by engaging in activities that make use of state facilities, and even though the amount of the fee is measured by the extent to which the payers use those facilities. This decision has provided a template for other state courts and taxing authorities that seek to evade Commerce Clause restrictions on the imposition of targeted fees for the use of facilities of interstate commerce. Because this holding involves recurring issues of great practical importance, imposes significant burdens on interstate commerce, and plainly departs from this Court's precedents, further review is warranted.

A. The FUT Cannot Satisfy This Court's Commerce Clause Test For User Fees

This case involves application of the fourth prong of the Commerce Clause test articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), which provides that a "state tax on interstate commerce" will be invalidated unless the tax "is fairly related to the services provided [to the taxpayer] by the State." 430 U.S. at 279.[3] It is common ground between the parties here that, where *general revenue taxes* are concerned, this "fair relationship" requirement is satisfied so long as "the measure of the tax [is] reasonably related to the extent of the [taxpayer's] contact" with the taxing State. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 626 (1981) (emphasis omitted). As to such taxes, the Court has held that "[t]he fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 199 (1995). Instead, so long as "the measure of a [general revenue] tax is reasonably related to the taxpayer's activities or presence in the State" – so long, that is, that the amount due varies according to the extent of the taxpayer's in-state activities – the taxpayer "will realize, in proper proportion to the taxes it pays, '[t]he only benefit to which the taxpayer is constitutionally entitled ... [:] that derived from his enjoyment of the privileges of living in

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[3] In addition to this requirement, a state tax is inconsistent with Commerce Clause requirements unless it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [and] [3] does not discriminate against interstate commerce." *Complete Auto Transit*, 430 U.S. at 279. See also, *e.g.*, *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 310-313 (1992). The application of these prongs of the *Complete Auto* test is not at issue here.

an organized society, established and safeguarded by the devotion of taxes to public purposes.'" *Commonwealth Edison*, 453 U.S. at 628-629 (quoting *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937) (ellipses and bracketed material added by the Court)).

The Court, however, has applied a very different Commerce Clause test to *user fees*. As the Court explained in *Commonwealth Edison*:

> "Such imposition[s], although termed a tax, *cannot be tested by the standards which generally determine the validity of taxes*." *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, 190 (1931). Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, *we have required a showing, based on factual evidence in the record, that "the fees charged do not appear to be manifestly disproportionate to the services rendered. ..."* *Clark* v. *Paul Gray, Inc.*, 306 U.S. [583], 599 [(1939)]. See *id.*, at 598-600; *Ingels* v. *Morf*, 300 U.S. [290], 296-297 [(1937)].
>
> One commentator has suggested that these "user" charges "are not true revenue measures and ... the considerations applicable to ordinary tax measures do not apply." P. Hartman, *State Taxation of Interstate Commerce* 20, n. 72 (1953). Instead, "user" fees "partak[e] ... of the nature of a rent charged by the State, based upon its proprietary interest in its public property, [rather] than of a tax, as that term is thought of in a technical sense." *Id.* at 122.

453 U.S. at 622 n.12 (ellipses and bracketed material added by the Court; emphasis added).[4] In choosing to apply the standard

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[4] This remains the law; the current version of Prof. Hartman's treatise makes the same point in almost precisely the same language.

governing general revenue taxes to the levy before it, *Commonwealth Edison* therefore "put to one side those cases in which the Court reviewed challenges to 'user' fees or 'taxes' that were designed and defended as a specific charge imposed by the State for use of state-owned facilities." 453 U.S. at 621 (citing *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972); *Clark* v. *Paul Gray, Inc.*, *supra*; *Ingels* v. *Morf*, *supra*).

Applying this user-fee test, the Court repeatedly has invalidated state fees where the record supported the conclusion that the amounts collected substantially exceeded the cost of services provided to the payers. See, *e.g.*, *Ingels*, 300 U.S. at 296-297; *Interstate Transit*, 283 U.S. at 190. Conversely, the Court has upheld such fees only after examining the record and determining that the fees were not "excessive in relation to cost incurred by the taxing authorities." *Evansville-Vanderburgh Airport Authority Dist.*, 405 U.S. at 719-720. See *Clark*, 306 U.S. at 599.

The FUT plainly cannot satisfy this Commerce Clause user fee test, and the court below did not suggest that it could. It is undisputed that there is *no* factual evidence in the record indicating that, so far as the FUT is concerned, there is *any*

See P. Hartman, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 670 (1981 & Supp. 1999). Prof. Walter Hellerstein, perhaps the nation's leading scholar of state and local taxation, recently made an identical argument in an *amicus* brief filed in this Court: "in the Commerce Clause context, the only distinction the Court has ever drawn between a tax and a fee is a distinction between general revenue measures, on the one hand, and user fees, on the other, and then only to point out that user fees are subjected to a *greater* degree of constitutional scrutiny than are general revenue measures." No. 98-1282, *Franks & Son, Inc.* v. *Washington*, Br. of *amicus* ATA in support of petitioner, at 9 n.5 (emphasis in original).

relationship between the amount of tax paid and the services provided to the payers, or *any* evidence from which it could be concluded that the FUT "purport[s] to approximate fairly the cost or value of the use of [the New York Thruway]." *American Trucking Ass'ns*, 483 U.S. at 290. To the contrary, on the current state of the record, it must be accepted that the FUT imposes costs on petitioners for use of the Thruway that are *manifestly greater* than the benefits provided by the State. The only information on the point is contained in the complaint, which alleges that "[t]he *entire* cost of operating the New York Thruway, including all administrative, maintenance and capital costs, *as well as the cost of traffic control, safety, and all policing functions*, are paid for through tolls, restaurant and service station concessions, and similar earnings." R. 23 (emphasis added).

B. The FUT Must Be Treated As A User Fee For Commerce Clause Purposes

Against this background, the dispositive question in this case is whether the FUT must be characterized for Commerce Clause purposes as a user fee rather than a general revenue tax.[5] The court below held the levy to be a general revenue tax, for two reasons: (1) the FUT "is not, by the plain import of its language, a user fee" because it ostensibly falls on the "privilege" of using New York's highways, and "[c]ases construing taxes imposed for the 'privilege' of conducting activities within the levying State normally involve revenue assessments, not user fees" (App., *infra*, 7a); and (2) the FUT is not "'designed and defended as a specific charge imposed by

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[5] The appropriate characterization of a state levy for purposes of the U.S. Constitution is, of course, a matter of federal law. See, *e.g.*, *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 609 (1975) (in addressing where legal incidence of a state tax falls when determining entitlement to constitutional tax immunity, "the duty rests on this Court to decide for itself").

the state for the use of state-owned or state-provided transportation or other facilities and services.'" *Id.* at 7a-8a (citation omitted). In several respects, however, this analysis misstates the test for identifying a user fee, is flatly inconsistent with this Court's precedents, and substantially undermines important Commerce Clause policies.

First, that the state legislature denominated the FUT a "privilege" tax rather than a user fee cannot control the analysis. The Court has held repeatedly, under both the Commerce Clause and related constitutional provisions, that it is the "practical effect" and "economic reality" of a levy, rather than its label, that must govern. *Complete Auto*, 430 U.S. at 278, 279. "'[W]e must regard things rather than names,'" which means that "[t]he crucial question" in this context is how a levy functions "in operation as well as nomenclature." *United States* v. *U.S. Shoe Corp.*, 523 U.S. 360, 367 (1998) (quoting *Pace* v. *Burgess*, 92 U.S. 372, 376 (1876)) (construing the Export Clause). Indeed, in *Complete Auto* itself – a decision relied upon by the court below for its analysis on this point (see App., *infra*, 7a) – this Court observed that "[t]here is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." 430 U.S. at 288.

It therefore is no surprise that a number of levies described by the Court as user fees for purposes of Commerce Clause analysis nevertheless were labeled "privilege taxes" in the state statutory text. See, *e.g.*, *Clark*, 306 U.S. at 586; *Interstate Transit*, 283 U.S. at 186. After all, if simply denominating a levy as one that falls on the "privilege" of engaging in particular activities were enough to shield it from the searching Commerce Clause review appropriate for user fees, a legislature's use of statutory boilerplate would determine the constitutionality of the levy, the Commerce Clause rule would

"stand[] only as a trap for the unwary draftsman" (*Complete Auto*, 430 U.S. at 279), and the Clause would afford almost wholly illusory protection. The New York court's embrace of such an approach cannot be reconciled with this Court's holdings.

Second, the FUT plainly is, in reality, a user fee that constitutes "a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services." *Commonwealth Edison*, 453 U.S. at 621. The FUT is imposed on a small group of payers – commercial motor carriers, who almost invariably are engaged in interstate commerce – and tax liability is incurred only because the payers conduct particular activities involving use of state highways. The amount due, moreover, varies directly with the *extent* of the use of state facilities; the more miles driven on New York roads, the more the carrier will pay in fees. Indeed, motor carriers receive a refund for taxes paid on fuel that is purchased but not consumed in New York.

The FUT thus would appear to be the very archetype of a user fee. Other levies treated by the Court as user fees have shared the same essential characteristics: they were imposed exclusively on a limited group of participants in interstate commerce by virtue of the payers' use of state roads or other facilities. See, *e.g.*, *Evansville-Vanderburgh Airport Authority Dist.*, 405 U.S. at 709-710 (fee on enplaning air passengers); *Clark*, 306 U.S. at 586-587 (fee on vehicles driven into State for purposes of sale); *Ingels*, 300 U.S. at 292 (fee for transporting vehicles into State for purposes of sale); *Interstate Transit*, 283 U.S. at 185 (fee on busses graduated according to seating capacity).[6]

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[6] The statutory language at issue here explicitly declares that the tax is imposed for the use of the State's highways: "Fuel use tax. (a) Imposition. There is hereby imposed on and after January first,

The conclusion that the FUT must be treated as a user fee is, moreover, compelled by the constitutional policy that underlies the user fee doctrine. Generally applicable taxes are appropriately subject to limited Commerce Clause review, "in spite of any adverse effects [they may have] on interstate commerce, * * * because '[t]he existence of major in-state interests adversely affected [by the taxes] ... is a powerful safeguard against legislative abuse.'" *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 200 (1994) (quoting *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981)) (second ellipses added by the Court). That safeguard, however, is of little value when the levy is a user fee that involves a limited number of payers – and, in particular, when the fee is one that falls almost exclusively on entities engaged in interstate commerce. In such cases, "a State's political processes can no longer be relied upon to prevent legislative abuse." *West Lynn Creamery*, 512 U.S. at 200.

Because such fees offer taxing authorities an easy mechanism by which to transfer the State's tax burden to out-of-state taxpayers and commercial interests, the Commerce Clause requires that they not be "excessive in comparison with the governmental benefit conferred." *Evansville-Vanderburgh Airport Auth. Dist.*, 405 U.S. at 717. This policy applies with full force to the FUT, which falls principally on (and demonstrably extracts excessive revenues from) motor carriers

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nineteen hundred ninety-six a tax on fuel use for the privilege of operating any qualified motor vehicle upon the public highways of this state." N.Y. Tax Law Art. 21-A, § 523. It is difficult to believe that a more explicit description of a user fee could be required under this Court's formulation. In any event, it cannot be the case that a levy escapes treatment as a user fee because the statutory text does not in terms declare that it is imposed as a charge for the use of state facilities. For reasons already stated, statutory boilerplate that has no operative effect cannot determine the constitutional status of a fee.

and truck drivers, a narrow category of taxpayers who engage predominantly in interstate commercial activities.

Viewing the FUT as a user fee for Commerce Clause purposes also draws support from decisions involving closely analogous constitutional and statutory provisions. In *U.S. Shoe*, for example, the Court held that the principal characteristic distinguishing a "user fee" from a "tax" under the Export Clause is that user fees "correlate reliably with the * * * services used or usable by the [payer]" and "fairly match the [payer's] use of [government] services and facilities." 523 U.S. at 369, 370. That is true of the FUT, the amount of which is precisely calibrated according to the payer's use of New York roads. Conversely, as then-Judge Breyer wrote in explaining how "to distinguish 'taxes' from regulatory 'fees' in a variety of statutory contexts," "[t]he classic 'tax' is imposed by a legislature upon many, or all, citizens." *San Juan Cellular Tel. Co.* v. *Public Service Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992). That is *not* true of the FUT, which is targeted to fall only upon motor carriers that use New York highways. And like many user fees, revenues from the FUT are placed in a segregated fund and dedicated in significant part to specified uses that are related to the activities giving rise to fee liability. See, *e.g.*, *Massachusetts* v. *United States*, 435 U.S. 444 (1978) (intergovernmental tax immunity doctrine); *Edye* v. *Robertson* (*Head Money Cases*), 112 U.S. 580, 595-596 (1884) (Uniformity Clause); *San Juan Cellular*, 967 F.2d at 685-687. The analysis used below is in considerable tension with these decisions.

Third, other indicia confirm the common sense view that the FUT is a user fee. The Federal Highway Administration of the U.S. Department of Transportation commonly treats all levies on motor vehicles and motor fuel as "user" fees and taxes. See, *e.g.*, U.S. Dept. of Transportation, *1999 Status of the Nation's Highways, Bridges and Transit: Conditions and Performance,*

Report to Congress, Chapter 6, at 6-4 (characterizing "Motor-Fuel Taxes" as "User Charges"). Courts in other States have agreed that highway taxes are a form of user fee. See, *e.g.*, *In re Oklahoma Capitol Improvement Auth.*, 958 P.2d 759, 764-765 (Okla. 1998) (describing Oklahoma highway taxes). Indeed, it is revealing that, prior to the filing of this lawsuit, the New York courts had *themselves* regarded the FUT as a user fee: the New York Court of Appeals described all of the State's highway taxes as "user-derived taxes and fees." *Schulz* v. *State*, 639 N.E.2d 1140, 1143 (N.Y. 1994). These exactions included "*taxes and fees derived from use of [highway] facilities*: vehicle registration fees, *the motor fuel tax*, the petroleum and aviation fuel business tax and miscellaneous highway use taxes." *Id.* at 1142 (emphasis added). It is only when faced with a constitutional challenge to the FUT that the state courts had a convenient, and surprising, change of heart.

Litigation in Indiana illustrates the nature of the problem. Before the Indiana fuel use tax was challenged in a case identical to this one, the Indiana Tax Court, on two occasions, had described that levy as a user tax. See *Area Interstate Trucking, Inc.* v. *Indiana Dept. of Revenue*, 605 N.E.2d 272, 277 (Ind. Tax Ct. 1992), cert. denied, 510 U.S. 864 (1993) ("the purpose of the motor carrier fuel tax is simply to charge motor carriers for the use of the public roads in Indiana"); *Roehl Transport, Inc.* v. *Indiana Dept. of Revenue*, 653 N.E.2d 539, 564 (Ind. Tax. Ct. 1995) (applying to Indiana's fuel use tax the rule applicable to user fees set forth in *Evansville-Vanderburgh*). Like the courts in New York, however, the Indiana Tax Court had a sudden change of heart when faced with having to treat the Indiana fuel use tax as a user fee for Commerce Clause purposes. See *Anderson* v. *Indiana Dept. of State Revenue*, 758 N.E.2d 597, 601 n.3 (Ind. Tax 2001) (appeal pending).

C. The Issue Presented Here Is An Important And Recurring One

The issue presented here is a recurring one of enormous practical importance that warrants this Court's attention. Motor fuel taxes like the FUT are imposed by all but one of the States. These levies have generated considerable litigation. At the time the present suit was initiated against the State of New York, three substantially identical cases were filed against state taxing authorities in Illinois, Indiana, and Ohio. Courts in each of these jurisdictions, following New York's lead, held that their fuel use taxes are not user fees. See *Owner-Operator Independent Drivers Ass'n* v. *Bower*, 757 N.E.2d 627, 633-634 (Ill. App. Ct. 2001) (appeal pending); *Anderson*, 758 N.E.2d at 601 n.3 (citing to the Illinois Appellate Court decision, which in turn relied on the New York decision at issue here); *Owner-Operator Independent Drivers Ass'n* v. *Tracy*, No. 99CVH02-1412, slip op. 11 (Ohio C.P. Franklin County, June 7, 2001) (Magistrate's decision on appeal to trial court). Absent intervention by this Court, the momentum generated by these decisions – and the reluctance of state courts to recognize constitutional limits on state taxing authority – inevitably will discourage future attempts to raise the substantial Commerce Clause issue presented here.

This is no small matter. Levies like the FUT are used to raise significant amounts of revenue – and impose correspondingly large burdens on interstate motor carriers. In excess of $60 million annually is at stake in this case alone. Nationwide, it is likely that taxes imposed by States on the use of motor fuel by commercial vehicles on toll roads amount to hundreds of millions of additional dollars. These amounts are large in absolute terms. And they have special importance for independent owner-operators like the members of OOIDA and the individual petitioners here, who pay a substantial portion of their revenue in motor fuel fees. Owner-operators under lease

to motor carriers typically are responsible for paying the cost of operating their equipment, including the cost of fuel and fuel use taxes. The burden of paying such taxes falls particularly hard on owner-operators, whose annual incomes are often in the range of $35,000-$40,000. At the same time, owner-operators comprise one of the primary sectors of the interstate motor carrier industry, accounting for an estimated 40% of intercity truck traffic in the United States; nationwide, there are hundreds of thousands of owner-operators. In this setting, if there are doubts about the constitutional status of levies like the FUT, it would be best for the Court to resolve them now, before States become subject to additional refund liability and motor carriers and owner-operators are subjected to additional unwarranted burdens.

That is especially so because the issue presented here has implications that go far beyond fees imposed on the use of motor fuel. The question whether a levy is a user fee may arise in a wide range of Commerce Clause contexts and may have relevance in other constitutional settings as well. Cf. *United States* v. *Sperry Corp.*, 493 U.S. 52, 60-61 (1989). Yet the approach taken by the decision below disregards the relevant holdings of this Court and threatens to wholly sap the Commerce Clause user fee doctrine of its vitality, offering state legislatures a rhetorical formula that always can be used to circumvent the constitutional rule. If the close scrutiny long required of user fees is to be cast aside, that step should be taken only after careful consideration of the issue by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2002

APPENDIX A

Supreme Court, Appellate Division, First Department, New York.

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, et al., Plaintiffs-Appellants,

v.

Michael H. URBACH, etc., Defendant-Respondent.

Dec. 7, 2000.

Association representing owners and operators of commercial motor vehicles brought declaratory judgment action to invalidate fuel use tax as violative of Commerce Clause insofar as it was imposed on commercial vehicles operated on New York Thruway. The Supreme Court, New York County, Jane Solomon, J., granted defendant's motion to dismiss, 699 N.Y.S.2d 268, and association appealed. The Supreme Court, Appellate Division, Rubin, J., held that tax did not violate Commerce Clause.

Affirmed.

Deon J. Nossel, of counsel (Robert A. Forte, on the brief, Eliot Spitzer, Attorney General of the State of New York, attorney) for defendant- respondent.

JOSEPH P. SULLIVAN, P.J., ERNST H. ROSENBERGER, ANGELA M. MAZZARELLI, ISRAEL RUBIN and JOHN T. BUCKLEY, JJ.

RUBIN, J.

In this class action, plaintiffs seek to invalidate the fuel use tax (Tax Law § 523) as violative of the Commerce Clause (U.S. Const., art. I, § 8, cl. [3]) insofar as the tax is imposed on commercial vehicles operated on the New York Thruway.

Plaintiffs contend that the tax, which is calculated on the mileage driven on New York highways, constitutes an undue burden on interstate commerce because it is not fairly related to any service provided by the State. On this appeal from an order dismissing the complaint, plaintiffs argue (a) that the State provides no services in connection with the operation of the New York Thruway, and (b) that such services as are provided to commercial vehicles by the New York Thruway Authority are fully paid for through the collection of tolls and other revenues, no part of which are contributed by the State. This Court concludes that the tax is not a user fee, but a consumption tax that is uniformly applied to interstate and intrastate activities. Therefore, the order of dismissal is affirmed.

Plaintiff Owner-Operator Independent Drivers Association is a not-for-profit corporation with its principal place of business in Missouri. Its members own and operate motor carrier equipment. The business association comprises some 40,000 persons and entities, including residents of all 50 States and Canada. Individual plaintiffs Raymond L. Kasicki and Harry Kijowksi, residents of Ohio and New York, respectively, operate commercial motor vehicles on New York State highways. Defendant Michael H. Urbach is the former Commissioner of the New York State Department of Taxation and Finance, which is responsible for the collection of the disputed tax.

Article 21-A of the Tax Law imposes "a tax on fuel use for the privilege of operating any qualified motor vehicle upon the public highways of this state" (Tax Law § 523[a]). The tax is computed on the fuel "used by a carrier in its operations within this state during each reporting period" (Tax Law § 523[b]). A "qualified motor vehicle" is a commercial vehicle having a gross weight exceeding 26,000 pounds or three or more axles (Tax Law § 521[b][1] [i], [ii]). As to the amount of fuel

actually consumed by operation of qualified vehicles within the State, each "carrier" (Tax Law § 521[c]) is required to remit payment, on a quarterly basis (Tax Law § 526[a], [b]) in an amount equivalent to the fuel and sales taxes imposed on motor fuel or diesel fuel, as applicable, purchased in this State, not to exceed a maximum rate of 7% (Tax Law § 523[b]). Revenues from the New York fuel tax are dedicated to the State's highway and bridge trust fund (Tax Law §§ 515; 528 [a]).

The obvious thrust of the statute is to tax fuel *consumed* within New York borders as though it were fuel *purchased* in New York State and, indeed, the law provides a credit for the amount of State fuel and sales taxes paid on fuel actually purchased here (Tax Law § 524). Finally, it is undisputed that the tax complies with the International Fuel Tax Agreement, pursuant to which each carrier pays all fuel use taxes imposed by the various participating jurisdictions to a single base State, which is responsible for properly allocating the receipts.

In dismissing the complaint, the IAS Court held that plaintiffs failed to demonstrate that the fuel use tax subjects similarly situated interstate and intrastate commercial interests to differential treatment and, thus, does not meet the threshold test for a Commerce Clause violation (182 Misc.2d 576, 578-579, 699 N.Y.S.2d 268, citing *Matter of Tamagni v. Tax Appeals Tribunal,* 91 N.Y.2d 530, 539, 673 N.Y.S.2d 44, 695 N.E.2d 1125, *cert. denied* 525 U.S. 931, 119 S.Ct. 340, 142 L.Ed.2d 280). "Both interstate and intrastate drivers are taxed based on in-State fuel usage and solely on such in-State usage; there is no differential treatment of intrastate and interstate commercial interests" (*supra,* at 579, 699 N.Y.S.2d 268). Even assuming that plaintiffs were able to establish differential treatment, the IAS Court continued (at 579, 699 N.Y.S.2d 268), the challenge fails under *Complete Auto Tr. v. Brady* (430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326, *reh. denied* 430 U.S. 976, 97 S.Ct. 1669, 52 L.Ed.2d 371), which holds (at 279, 97 S.Ct.

1076) that a tax is valid if it is "applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." As the IAS court noted, plaintiffs concede that " 'there is almost a perfect correlation between the use of the road and the amount of the tax paid' " (182 Misc.2d 576, 699 N.Y.S.2d 268, *supra,* at 580, 699 N.Y.S.2d 268, quoting plaintiffs' memorandum of law).

On appeal, plaintiffs argue that "[t]he fuel tax at issue is obviously and inescapably a user fee or user tax" and that the State has not met "its burden of showing that it provides additional services to Thruway users equal to the 5-7.5 cents per mile charged under the fuel use tax." They conclude that the tax "is not reasonably related to services or facilities provided and is, therefore, an undue burden on commerce."

The defect in this argument is that a carrier operating exclusively within the borders of this State is subject to exactly the same tax as a carrier engaged in the interstate shipment of goods. That is, the local carrier is identically taxed on fuel actually consumed in the course of operating its vehicles on the New York Thruway. Thus, plaintiffs have not identified any adverse effect on interstate commerce that requires judicial scrutiny. As pointed out in *General Motors Corp. v. Tracy,* 519 U.S. 278, 299, 117 S.Ct. 811, 136 L.Ed.2d 761, the fundamental objective of the Commerce Clause is "preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors."

The parties vigorously dispute the role of discrimination as an essential element in a violation of the Commerce Clause. Defendant Department of Taxation relies upon the Court of Appeals' statement in *Matter of Tamagni v. Tax Appeals Tribunal, supra,* at 539, 673 N.Y.S.2d 44, 695 N.E.2d 1125 that

> "the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it 'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce' * * *. As we use the term here, 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" ([*Oregon Waste Sys. v. Department of Envtl. Quality of Ore.*, 511 U.S. 93], at 99, 114 S.Ct. 1345, 128 L.Ed.2d 13, quoting *Hughes v. Oklahoma,* [441 U.S. 322], at 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979)). If there is no differential treatment of identifiable, similarly situated in-State and out-of-State interests, there is no dormant Commerce Clause violation.

Plaintiffs, on the other hand, view this interpretation as overly expansive, noting that it is not essential to allege discrimination to state a valid claim. Therefore, they assert that it was precipitous for the IAS Court to have summarily dismissed the alleged violation of the Commerce Clause. In support of their position, plaintiffs rely on the United States Supreme Court's decision in *General Motors Corp. v. Tracy, supra,* at 298, n. 12, 117 S.Ct. 811, which states,

> our cases have indicated that even nondiscriminatory state legislation may be invalid under the dormant Commerce Clause, when, in the words of the so-called *Pike* undue burden test, "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). * * * [A] small number of our cases have invalidated state laws under the dormant Commerce Clause that appear to have been genuinely nondiscriminatory, in the sense that they did not impose disparate treatment on similarly situated in- state

and out-of-state interests, where such laws undermined a compelling need for national uniformity in regulation.

(*e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 101 S.Ct. 1309, 67 L.Ed.2d 580 [length of trucks]; *Bibb v. Navajo Freight Lines,* 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 [size of truck mud flaps]; *Southern Pac. Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 [length of trains]). Plaintiffs have failed to allege how the need for regulatory consistency is implicated in this case. Therefore, while plaintiffs may have demonstrated that, in the abstract, a Commerce Clause violation may be upheld without a showing of discrimination, they have not established that the *Pike* undue burden test has any application to the facts of this case. In the absence of demonstrable preference, it is incumbent upon plaintiffs to identify some prohibited interference with interstate commerce under the *Pike* undue burden test to obviate the need to establish that their commercial interests have received disparate treatment from those of similarly situated intrastate operators.

That the Court of Appeals' language in *Tamagni* might be taken to be overly expansive in view of the *Pike* test merely illustrates the caution stated by the Court in *Matter of Staber v. Fidler,* 65 N.Y.2d 529, 535, 493 N.Y.S.2d 288, 482 N.E.2d 1204, quoting *Dougherty v. Equitable Life Assur. Socy.*, 266 N.Y. 71, 88, 193 N.E. 897, "No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association." *Tamagni* (*supra*), involving the taxation of income based upon residency in multiple States, entails no national policy with regard to regulation and, thus, there was no reason to for the Court to discuss a limited exception to the general rule requiring a violation of the Commerce Clause to be supported by a demonstration that a State has discriminated against the economic interests of interstate operators.

What remains of plaintiffs' position is the bald assertion that the fuel use tax imposed by Tax Law § 523 is a user fee. Because any user fee that fails to fairly reflect the value of the service provided by the State that imposes it is, ipso facto, an undue burden on interstate commerce, plaintiffs contend that a violation of the Commerce Clause is asserted. Plaintiffs, however, do not present convincing arguments to support their contention that the disputed tax is a user fee.

Cases construing taxes imposed for the "privilege" of conducting activities within the levying State normally involve general revenue assessments, not user fees (*e.g., Complete Auto Tr. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326, *supra* [privilege of doing business]; *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 629, 101 S.Ct. 2946, 69 L.Ed.2d 884 ["substantial privilege of mining coal"]; *Colonial Pipeline Co. v. Traigle,* 421 U.S. 100, 95 S.Ct. 1538, 44 L.Ed.2d 1 [doing business]). Therefore, a tax levied merely "for the privilege of operating any qualified motor vehicle upon the public highways" (Tax Law § 523[a]) is not, by the plain import of its language, a user fee. By contrast, the State "highway use tax" is imposed "for the privilege of operating any vehicular unit upon the public highways of this state and for the purpose of recompensing the state for the public expenditures incurred by reason of the operations of such vehicular units on the public highways of this state" (Tax Law § 503[1]).

The plain language of the fuel use tax does not support plaintiffs' contention. Neither have plaintiffs demonstrated to the satisfaction of this Court that the fuel use tax is "designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services" (*Commonwealth Edison Co. v. Montana, supra,* at 621, 101 S.Ct. 2946) so as to place it beyond the scope of the test set forth in *Complete Auto Tr. v. Brady, supra.*

As the *Commonwealth* Court stated in a footnote (at 622, n. 12, 101 S.Ct. 2946), "One commentator has suggested that these 'user' charges 'are not true revenue measures and ... the considerations applicable to ordinary tax measures do not apply' " (quoting P. Hartman, State Taxation of Interstate Commerce 20, n. 72 [1953]). Plaintiffs herein allege only that the calculation of the fuel use tax based upon mileage amassed on the State's highways and the ultimate disposition of funds derived from the levy in the highway and bridge trust fund together operate to render the measure a use tax. As plaintiffs succinctly phrase it, "Since it is calculated on the use of State highways, it is a use tax."

This argument fails to accord appropriate significance to the role of apportionment in assessing the propriety of a State tax measure under the Commerce Clause. The function of apportionment in avoiding unfavorable treatment of interstate economic activity has been compared to that of the *Pike* undue burden test. As stated in *General Motors Corp. v. Tracy supra,* at 298, n. 12, 117 S.Ct. 811, "In the realm of taxation, the requirement of apportionment plays a similar role by assuring that interstate activities are not unjustly burdened by multistate taxation. *See generally Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 184-185, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) (discussing 'internal' and 'external' consistency tests for apportionment of state taxes)." The International Fuel Tax Agreement assures fairness in the allocation of tax revenues by fixing each participant's share of the proceeds on the number of miles actually traveled through the jurisdiction.

Plaintiffs nevertheless argue that the fuel use tax violates the test set forth in *Complete Auto Tr. v. Brady, supra,* at 279, 97 S.Ct. 1076 because it is not "fairly related to the services provided by the State" (*see also, Commonwealth Edison Co. v. Montana, supra,* at 617, 101 S.Ct. 2946). It is plaintiffs'

contention that, because the New York State Thruway Authority is "self-supporting", as stated in its 1997 Annual Report, it needs no additional revenue for the operation of the highway. Therefore, they contend, the State provides no benefit with respect to the operation of commercial vehicles on the roadway that would justify the tax under the *Complete Auto* test.

Plaintiffs' reading of the fourth prong of the *Complete Auto* test is overly restrictive. Merely because the assessed taxes are not necessary to support the use of the services or facilities upon which they are levied does not require the conclusion that the State confers no benefit upon plaintiffs. As the Court stated in *Oklahoma Tax Commn. v. Jefferson Lines, supra,* 514 U.S. at 199, 115 S.Ct. 1331:

> The fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity. If the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event.

To be sure, as noted in *Commonwealth Edison Co. v. Montana, supra,* at 629, 101 S.Ct. 2946, "when the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce." However, in the same paragraph, the Court emphasized that, when the tax is reasonably apportioned, the taxpayer will realize, in proper proportion to the taxes it pays, " '[the] only benefit to which the taxpayer is constitutionally entitled ... [:] that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public

purposes' " (quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522, 57 S.Ct. 868, 81 L.Ed. 1245). Often cited as a benefit bestowed by the taxing jurisdiction is the provision of "police and fire protection" (*supra,* at 628, 57 S.Ct. 868). It bears emphasis that police, fire, ambulance and paramedic services are made available to plaintiffs either by various localities within the vicinity of the highway or by State entities other than the New York Thruway Authority. In view of the concededly precise correlation between plaintiffs' use of the Thruway and the resultant tax imposed, the measure complies with the fair relation test of *Complete Auto Tr. v. Brady, supra,* at 279, 97 S.Ct. 1076.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Jane Solomon, J.), entered December 3, 1999, which granted defendant Tax Commissioner's motion to dismiss plaintiffs' declaratory judgment action and which adjudged and declared that Tax Law § 523 does not violate the Commerce Clause, should be affirmed, without costs.

Order and judgment (one paper), Supreme Court, New York County (Jane Solomon, J.), entered December 3, 1999, affirmed, without costs.

All concur.

APPENDIX B

Supreme Court, New York County, New York.

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION et al., Plaintiffs,

v.

Michael H. URBACH, as Commissioner of New York State Department of Taxation and

Finance, Defendant.

Nov. 10, 1999

Nonresident truckers and a trucking industry group sued to challenge the constitutionality of the fuel use tax statute. On a motion to dismiss, the Supreme Court, New York County, Jane S. Solomon, J., held that the statute did not violate the negative or dormant Commerce Clause as applied to nonresident truckers using the state thruway.

Motion granted.

Paul D. Cullen, Sr., Washington, D.C., and Lord, Bissell & Brook, New York City (Cary Samowitz of counsel), for plaintiffs.

JANE S. SOLOMON, J.

This proposed class action challenges the constitutionality of New York Tax Law § 523, which requires the collection of a tax on fuel use on commercial vehicles based on their miles driven on the Governor Thomas E. Dewey Thruway, also known as the New York State Thruway ("Thruway"). Defendant Michael H. Urbach, the former Commissioner of the New York State Department of Taxation and Finance ("Department"), moves to dismiss the proposed class action

complaint for failure to state a cause of action (CPLR 3211[a][7]), and for lack of subject matter jurisdiction due to plaintiffs' failure to exhaust administrative remedies (CPLR 3211[a][2]).

FACTUAL BACKGROUND

Plaintiff Owner-Operator Independent Drivers Association ("Association") is a business association of persons and entities who own and operate motor carrier equipment. The Association, which was founded in 1973 and has over 40,000 members, is a not-for-profit corporation which is incorporated and has its principal place of business in the State of Missouri. The individual plaintiffs, Raymond L. Kasicki and Harry Kijowski, reside in Ohio and New York, respectively. Both of them operate tractor trailers on highways of the State of New York.

The challenged statute was enacted by the Laws of 1994, Chapter 170, § 8, effective January 1, 1996. The statute provides a tax on fuel use "for the privilege of operating any qualified motor vehicle upon the public highways of this state." Tax Law § 523(a). The fuel use tax ("FUT") applies to vehicles engaged in either intrastate or interstate commerce. The FUT is only collected on fuel consumed while driving on the public highways in New York. The operator of a motor carrier purchasing fuel within the State is entitled to a credit or refund for the tax paid for such fuel at the pump when the fuel is consumed outside the State. Tax Law § 524. The operator of a motor carrier which purchases fuel outside the State but consumes the fuel within the State is required to pay the FUT to New York.

DISCUSSION

Since defendant moved to dismiss prior to answering, all of plaintiffs' allegations are presumed to be true. *Weinbaum v.*

Cuomo, 219 A.D.2d 554, 631 N.Y.S.2d 825 (1st Dept.1995), *appeal dismissed* 87 N.Y.2d 917, 641 N.Y.S.2d 595, 664 N.E.2d 506 (1996).

Plaintiffs assert that New York's FUT violates article I, section 8, clause 3 of the United States Constitution (the "Commerce Clause"), which is referred to as the negative or dormant Commerce Clause. The basis for this argument is that plaintiffs have paid fuel use taxes of 30 cents per gallon[1] of fuel consumed while traveling the Thruway, and have paid tolls to the Thruway Authority--an independent agency that receives no funds from the State for the construction, maintenance or operation of the Thruway--for their use of the Thruway. Plaintiffs' position is that the tolls collected pay for all material services provided to commercial vehicles operating on the Thruway.[2] Plaintiffs maintain that the Department's collection of FUT on account of miles driven by commercial vehicles on the Thruway is not fairly related to any services provided by the State of New York in connection with interstate travel over the Thruway, since the FUT collected is not used for the maintenance or operation of the Thruway. Therefore, plaintiffs assert, the collection of FUT on the basis of miles driven by commercial vehicles on the Thruway is an undue burden on interstate commerce.

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[1] While defendant asserts that the FUT is actually 16 cents per gallon, and that plaintiffs have actually included a Petroleum Business Tax in their calculation, the amount of the FUT is not a material factual issue.

[2] Plaintiffs' assertion is based on the 1997 Annual Report of the Thruway Authority, which states that the Authority is "self-supporting from tolls and other sources" and that "[t]he Authority is solely responsible for its finances." New York State Thruway Authority 1997 Annual Report, at 16, 28.

"[T]he negative, or dormant, [Commerce] Clause invalidates only State measures which 'unjustifiably * * * discriminate against or burden the interstate flow of articles of commerce.' " *Tamagni v. Tax Appeals Tribunal of State of New York,* 91 N.Y.2d 530, 539, 673 N.Y.S.2d 44, 695 N.E.2d 1125, *cert. denied* 525 U.S. 931, 119 S.Ct. 340, 142 L.Ed.2d 280 (1998), quoting *Oregon Waste Sys. v. Department of Envtl. Quality of State of Oregon,* 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). As the Court of Appeals stated in *Tamagni,* a court's first step in analyzing any law subject to scrutiny under the negative Commerce Clause

> "is to determine whether it 'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce' * * *. As we use the term here, 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" (*id.,* at 99 [114 S.Ct. 1345], quoting *Hughes v. Oklahoma, supra,* 441 U.S. [322], at 336 [99 S.Ct. 1727, 60 L.Ed.2d 250 (1979)]). If there is no differential treatment of identifiable, similarly situated in-State and out-of-State interests, there is no dormant Commerce Clause violation.

Tamagni v. Tax Appeals Tribunal of State, supra, 91 N.Y.2d, at 539, 673 N.Y.S.2d 44, 695 N.E.2d 1125. Put another way, "the first step in the dormant Commerce Clause inquiry * * * is to identify the interstate market that is being subjected to discriminatory or unduly burdensome taxation." *Id.* at 540, 673 N.Y.S.2d 44, 695 N.E.2d 1125.

The tax at issue here does not operate to the disadvantage of any identifiable interstate market. The tax applies in exactly the same manner with respect to intrastate and interstate users of New York's roadways. Both interstate and intrastate drivers are taxed based on in-state fuel usage and solely on such

are taxed based on in-state fuel usage and solely on such in-state usage; there is no differential treatment of intrastate and interstate commercial interests. Additionally, fuel usage on the Thruway is not treated differently than fuel usage on any other New York State roadway. Accordingly, plaintiffs cannot meet the threshold of demonstrating that two groups have been treated differently so as to improperly burden interstate commerce.

Even assuming, *arguendo,* that plaintiffs had met this threshold inquiry, plaintiffs' claim fails under *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326, *rehg. denied* 430 U.S. 976, 97 S.Ct. 1669, 52 L.Ed.2d 371 (1977) ("*Complete Auto*"). In *Complete Auto, supra,* the Supreme Court set forth the test to determine whether a particular tax violates the Commerce Clause. The Court explained that a tax will be sustained against a Commerce Clause challenge if the tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279, 97 S.Ct. 1076. Here, plaintiffs' challenge to Tax Law § 523 fails under the fourth prong of the *Complete Auto* standard, since the tax is "fairly related to the services provided by the State."

The "fair relation" prong of the *Complete Auto* test

> requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity. If the event is taxable, the proceeds of the tax may ordinarily be used for purposes unrelated to the taxable event. Interstate commerce may thus be made to pay its fair share of state expenses and " 'contribute to the cost of providing *all* governmental

> services, including those services from which it arguably receives no direct "benefit." ' "

Oklahoma Tax Commn. v. Jefferson Lines, Inc., 514 U.S. 175, 199-200, 115 S.Ct. 1331, 131 L.Ed.2d 261, *rehg. denied* 514 U.S. 1135, 115 S.Ct. 2018, 131 L.Ed.2d 1016 (1995), quoting *Goldberg v. Sweet*, 488 U.S. 252, 267, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989). In *Oklahoma Tax Commn. v. Jefferson Lines, Inc., supra,* the Court upheld a tax on interstate bus ticket sales, illustrating that

> [t]he bus terminal may not catch fire during the sale, and no robbery there may be foiled while the buyer is getting his ticket, but police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of a tax.

Oklahoma Tax Commn. v. Jefferson Lines, Inc., supra, 514 U.S., at 200, 115 S.Ct. 1331.

Here, too, plaintiffs may never need the services of the fire or police departments, but these services are available if needed. *See, New York State Thruway Authority v. Dufel,* 129 A.D.2d 44, 47, 516 N.Y.S.2d 981 (3d Dept.1987) (discussing the joint efforts of the State and Thruway Authority to address emergencies relating to operation of the Thruway and its commercial traffic following collapse of Thruway bridge); *see also, Brooks v. Forsythe,* 189 A.D.2d 26, 594 N.Y.S.2d 439 (3d Dept.1993); *Hutley v. N.Y.S. Thruway Authority,* 139 Misc.2d 868, 529 N.Y.S.2d 258 (Ct.Cl.1988). At a minimum, though, plaintiffs have no doubt used local and access roads, which are not funded by the Thruway Authority.[3] Even assuming

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[3] This court rejects plaintiffs' assertion that whether commercial vehicles derive any benefit from local police, fire and ambulance services, and local roads and access roads not funded by the

plaintiffs' claim is true--i.e., that the full cost of the Thruway is covered by the tolls imposed--the State provides other services that may be paid for through the FUT.

Moreover, plaintiffs acknowledge that "there is almost a perfect correlation between the use of the road and the amount of the tax paid." Plaintiffs' Memorandum of Law in Opp., at 15. "[W]hen the measure of a tax is reasonably related to the taxpayer's activities or presence in the State--from which it derives some benefit * * *--the taxpayer will realize, in proper proportion to the taxes it pays, * * * [the benefit] 'of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.'" *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 628-629, 101 S.Ct. 2946, 69 L.Ed.2d 884, (1981), quoting *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 522, 57 S.Ct. 868, 81 L.Ed. 1245 (1937). Therefore, to the extent that this Court need reach the *Complete Auto* test, defendant has met its burden of showing that the FUT imposed on the use of the Thruway is fairly related to the services provided by the State. *See, D.H. Holmes Co. v. McNamara,* 486 U.S. 24, 32, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988) (provision of police and fire protection, together with other civic services, satisfied *Complete Auto* test). Plaintiffs derive a substantial benefit from the State for the use of its highway system; the tolls paid for the use of the Thruway do not cover these additional benefits and expenses to the State. Since the FUT is fairly related to these additional benefits and services, it survives plaintiffs' constitutional challenge.

In view of the foregoing, this Court need not address the issue of exhaustion of administrative remedies with respect to a refund of the taxes paid.

Thruway, raises a factual issue that cannot be considered on a motion to dismiss.

The procedural posture of defendant's motion is a motion to dismiss the complaint. Plaintiffs assert that at this stage of the proceeding, on a motion to dismiss, the only issue before the Court is whether the Court has jurisdiction of the matter and not whether or not the plaintiffs are entitled to a favorable declaratory judgment. To the contrary, if no issue of fact is raised by the pleadings, or if the facts are conceded, a proper case is presented for judgment on the merits on defendant's motion to dismiss the complaint. *Law Research Service, Inc. v. Honeywell, Inc.*, 31 A.D.2d 900, 901, 298 N.Y.S.2d 1 (1st Dept.1969). The proper relief here is a declaration in defendants' favor. *See, Friedman v. Board of Educ. of East Ramapo Cent. School Dist.*, 259 A.D.2d 464, 686 N.Y.S.2d 84 (2d Dept.1999).

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted; and it is further

ADJUDGED AND DECLARED that Tax Law § 523 does not violate the Commerce Clause.

APPENDIX C

State of New York,
Court of Appeals

At a session of the Court,
held at Court of Appeals Hall
in the City of Albany on the
sixteenth day of October 2001

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

1-10 Mo. No. 892
Owner-Operator Independent
Drivers Association, et al.,
Appellants,
v.
Michael H. Urbach, as Commissioner
of the Department of Taxation and
Finance of the State of New York,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Stuart M. Cohen
Clerk of the Court

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

DECISION October 16, 2001

1-10 Mo.No. 892
Owner-Operator Independent
Drivers Association, et al.,
Appellants,

v.

Michael H. Urbach, as Commissioner
of the Department of Taxation and
Finance of the State of New York,
Respondent.

APPENDIX D

Article 21-A, § 523 of the New York Tax Law provides:

Fuel use tax. (a) Imposition. There is hereby imposed on and after January first, nineteen hundred ninety-six a tax on fuel use for the privilege of operating any qualified motor vehicle upon the public highways of this state.

(b) Rate of tax. The tax imposed by this section shall be at a composite rate determined by adding together (1) a fuel tax component which shall be equivalent to the applicable rate per gallon in effect under the taxes on motor fuel and diesel motor fuel imposed by article twelve-A of this chapter and (2) a sales tax component, which shall be equivalent to the rate per gallon applicable to the receipts from the sale of a gallon of motor fuel or diesel motor fuel in effect under the sales and compensating use taxes imposed by sections eleven hundred five and eleven hundred ten of this chapter plus the highest rate applicable to the receipts from the sale of a gallon of motor fuel or diesel motor fuel in effect in any locality of this state imposing a local sales and compensating use tax on the sale of motor fuel and diesel motor fuel under the authority of section twelve hundred ten of this chapter; provided, however, that the total rate per gallon applicable to the receipts from the sale of a gallon of such fuels imposed under paragraph two of this subdivision shall not exceed seven percent. Such total equivalent rate per gallon under paragraph two of this subdivision shall be determined as provided in subdivision (d) of section eleven hundred eleven of this chapter and the schedules prescribed by the commissioner pursuant to such subdivision, and shall be based on the average price per gallon (including all federal and state and any local taxes included in such price or imposed on the use or consumption of such fuels upon which the state and local sales tax is

computed but determined without the inclusion of any state and local sales tax on receipts from sales of such fuels) paid by the carrier during the reporting period for all motor fuel and diesel motor fuel purchased for use in its operations either within or without this state. The price for motor fuel and diesel motor fuel purchased by such carrier shall be deemed to be the prevailing price for motor fuel and diesel motor fuel, as established by the commissioner each calendar quarter pursuant to this section, applicable to the reporting period. The commissioner shall for each calendar quarter establish a prevailing price for motor fuel and diesel motor fuel based on the prices being charged on any given day during the first fifteen days of the previous calendar quarter at a minimum of ten selected truck stops widely scattered throughout the state. Such tax shall be computed by multiplying such composite rate by the amount of motor fuel or diesel motor fuel, as the case may be, used by a carrier in its operations within this state during each reporting period. The amount of motor fuel and diesel motor fuel used in the operations of any carrier within this state shall be determined by dividing the number of miles traveled in this state subject to tax under this section by the average miles per gallon for the type of fuel. Where the records of any carrier are inadequate or incomplete, the qualified motor vehicles of a carrier filing returns shall be deemed to have consumed, on the average, one gallon of diesel motor fuel for every four miles traveled or one gallon of motor fuel for every three miles traveled unless substantial evidence discloses that a different amount was consumed; provided,however, that if the commissioner enters into a cooperative agreementpursuant to section five hundred twenty-eight of this article and such agreement prescribes a different average miles per gallon deemed to be consumed, the commissioner shall prescribe such different average.

Article 13-A, § 301-h, of the New York Tax Law provides in relevant part:

Tax relating to carriers. (a)(1) Notwithstanding any other provision of this chapter, there is hereby imposed a monthly tax measured by the rate of the tax hereunder times the number of gallons of motor fuel and diesel motor fuel imported into this state in the fuel tanks of qualified motor vehicles which (i) previously thereto, have not been included in the measure of the tax imposed by section three hundred one-a of this article and (ii) are consumed in this state in the operation of such qualified motor vehicles. Such number of gallons so imported shall be the positive difference between the gallonage consumed by the carrier in this state in its operations during the reporting period and the gallonage purchased by the carrier in this state during the reporting period, which gallonage has been included in the measure of the tax imposed by such section three hundred onea of this article. Each carrier shall be entitled to a credit, equal to the tax under this article absorbed by such carrier with respect to any excess of gallonage purchased in the state during the reporting period over gallonage so consumed in this state during such period, against the tax for which such carrier would otherwise be liable for the eight succeeding calendar quarters following the end of the reporting period for which such excess was derived, or, if a claim for refund is filed on or before the last day of the month immediately following the four-year period commencing with the end of the reporting period for which such excess was derived, the amount of such credit shall be refunded. (2) The rate of the tax imposed by this section shall be equal to the motor fuel and automotive-type diesel motor fuel rate set by subdivision (e) of section three hundred one-a plus the rate of the supplemental tax imposed by section three hundred one-j of this article as such rates are specified therein and as they may be adjusted as provided in

suchprovisions. In addition, the tax surcharge imposed by section three hundred-one-g of this article shall be imposed with respect to the tax imposed by this section as if the tax imposed hereunder were imposed by section three hundred-one-a of this article. (3) The tax and tax surcharge shall be upon the carrier, as defined for purposes of the tax imposed by article twenty-one-A of this chapter, except that where the carrier is not the owner of such qualified motor vehicle, the tax shall be a joint and several liability upon both the carrier and the owner. The term "qualified motor vehicle" shall mean such term as defined for the purposes of the tax imposed by such article twenty-one-A. The exemptions provided by section five hundred twenty-five of such article twenty-one-A shall apply to the tax imposed by this section.

* * * *

(c) Joint administration. The commissioner shall jointly administer the taxes imposed by article twenty-one-A of this chapter and the tax imposed by this section, including the joint reporting and payment, assessment, collection, determination and refund or credit of such taxes. For purposes of the joint administration of taxes, the commissioner`s functions under such article twenty-one-A and any returns, forms, statements, documents or information to be submitted to the commissioner under such article, any books and records to be kept for purposes of the taxes imposed by such article, any schedules of amounts to be collected under such article, and the payment of taxes under such article, shall apply to the tax imposed by this section and shall be on a joint basis with respect to such tax imposed by this section and the taxes imposed by such article.